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Election Law

Cases and Materials

FOURTH EDITION

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For
Sharon
Aaron
Nathan
—D.H.L.

For
Lori
Deborah
Shana
Jared
—R.H.

For
Renuka
—D.T

To the memory of
our friend and colleague,
Gary Schwartz
—D.H.L. and R.H.

Summary of Contents

Chapter 1 · Introductory Readings	3
I. Factions and the Public Interest	3
II. Citizens and Representatives	11
III. Pluralism and Progressivism	14
IV. Electoral Process and Democracy	23
Chapter 2 · The Right to Vote	27
I. A Brief History of the Right to Vote in the United States	28
II. Court Review of State Limitations on the Franchise	40
Chapter 3 · Representation	65
I. The Right to an Equally Weighted Vote	65
II. Voting, Representation, and “Special-Purpose” Elections	86
Chapter 4 · Districting Criteria	103
Chapter 5 · Minority Vote Dilution	115
I. Beyond the Right to Cast a Ballot	115
II. Applying Section 5	121
III. Applying Section 2	143
IV. Racial Gerrymandering	193
Chapter 6 · Partisan Gerrymandering	243
I. Defining and Identifying Gerrymanders	243
II. Gerrymandering and the Constitution	252
Chapter 7 · Election Administration	281
I. Equal Protection and the Counting of Votes	282
II. Voting Technology	306
III. Voter Identification	314
IV. Law and Participation	332
Chapter 8 · Ballot Propositions	349
I. Pros and Cons	350
II. Content Restrictions	369
III. Procedural Requirements and Judicial Review	394
IV. Financing Qualification Drives	406

Chapter 9 · Major Political Parties	417
I. The Party and the Political System	418
II. Obligations of Parties under the Constitution	435
III. Associational Rights of Parties	448
IV. Parties and Patronage	478
Chapter 10 · Third Parties and Independent Candidates	501
I. Ballot Access	504
II. Minor Parties, Public Benefits, and Laws Favoring the Two-Party System	520
Chapter 11 · Campaigns	549
Chapter 12 · Incumbency	579
I. The Incumbency Advantage	580
II. Perquisites	598
III. Competitiveness in Election Law Jurisprudence	618
Chapter 13 · Bribery	631
I. Bribery of Candidates	632
II. The Elements of Bribery	640
Chapter 14 · The <i>Buckley</i> Framework	677
I. Introduction: Basic Facts and Figures about Campaign Financing in the U.S.	677
II. <i>Buckley v. Valeo</i> : The Foundation of American Campaign Finance Jurisprudence	679
III. Empirical Observations about, and Theoretical Justifications for, Campaign Finance Regulation	713
Chapter 15 · Contribution Limits after <i>Buckley</i>	737
I. Campaign Contribution Limits in Ballot Measure Elections	737
II. When Are Contribution Limits Too Low?	744
III. The End of Soft Money and the Regulation of PACs and Other Independent Expenditure Committees	790
Chapter 16 · Spending Limits after <i>Buckley</i>	807
I. Corporate Spending Limits in Ballot Measure Campaigns	807
II. Limiting Spending by Corporations, Labor Unions, and Others in Candidate Elections	823
III. Regulating Corporate and Union “Issue Advocacy:” The End of Spending Limits?	850
Chapter 17 · Public Financing	875
I. Existing Public Financing Systems	877
II. Public Financing: Voluntary or Coercive?	893
III. Proposals for Reform	905
Chapter 18 · Campaign Finance Disclosure	913
Appendix · Election Law Research Guide	949

Contents

Summary of Contents	vii
Introduction to the Fourth Edition	xv
Introduction to the Third Edition	xvii
Introduction to the Second Edition	xix
Introduction to the First Edition	xxi
Copyright Acknowledgments	xxv
Chapter 1 · Introductory Readings	3
I. Factions and the Public Interest	3
James Madison, <i>THE FEDERALIST PAPERS</i> , No. 10	4
II. Citizens and Representatives	11
Edmund Burke, <i>Speech to the Electors of Bristol</i>	11
III. Pluralism and Progressivism	14
Richard J. Ellis, <i>Pluralism</i>	14
IV. Electoral Process and Democracy	23
Irving Kristol, <i>REFLECTIONS OF A NEOCONSERVATIVE</i>	23
Chapter 2 · The Right to Vote	27
I. A Brief History of the Right to Vote in the United States	28
A. The Extension of the Suffrage	28
1. The Attainment of White Male Suffrage	28
2. The Fifteenth Amendment and Its Betrayal	30
3. Votes for Women	34
4. The Reenfranchisement of African Americans in the South	36
5. Additional Extensions of the Franchise	39
II. Court Review of State Limitations on the Franchise	40
<i>Harper v. Virginia State Board of Elections</i>	40
<i>Skafto v. Rorex</i>	48
<i>Kramer v. Union Free School District No. 15</i>	56
Chapter 3 · Representation	65
I. The Right to an Equally Weighted Vote	65
<i>Reynolds v. Sims</i>	66
<i>Lucas v. 44th General Assembly of Colorado</i>	68
<i>Avery v. Midland County</i>	78
II. Voting, Representation, and “Special-Purpose” Elections	86
<i>Salyer Land Co. v. Tulare Lake Basin Water Storage District</i>	86

Chapter 4 · Districting Criteria	103
<i>Legislature v. Reinecke</i>	105
Chapter 5 · Minority Vote Dilution	115
I. Beyond the Right to Cast a Ballot	115
<i>Allen v. State Board of Elections</i>	116
II. Applying Section 5	121
<i>Beer v. United States</i>	122
<i>Georgia v. Ashcroft</i>	133
III. Applying Section 2	143
<i>Thornburg v. Gingles</i>	145
<i>Holder v. Hall</i>	186
IV. Racial Gerrymandering	193
<i>Shaw v. Reno</i>	197
Post- <i>Shaw</i> Decisions	217
<i>League of United Latin American Citizens v. Perry</i>	233
Chapter 6 · Partisan Gerrymandering	243
I. Defining and Identifying Gerrymanders	243
II. Gerrymandering and the Constitution	252
<i>Vieth v. Jubelirer</i>	257
Chapter 7 · Election Administration	281
I. Equal Protection and the Counting of Votes	282
<i>Bush v. Gore</i>	285
II. Voting Technology	306
<i>Wexler v. Anderson</i>	308
III. Voter Identification	314
<i>Crawford v. Marion County Election Board</i>	315
IV. Law and Participation	332
A. Empirical Research on Voter Turnout	333
B. Laws Affecting Participation	339
1. The Language Assistance Provisions of the Voting Rights Act	339
2. The National Voter Registration Act	341
3. The Help America Vote Act	342
4. Other Laws That Might Promote Participation	343
Chapter 8 · Ballot Propositions	349
I. Pros and Cons	350
Richard J. Ellis, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA	350
II. Content Restrictions	369
<i>People's Advocate v. Superior Court</i>	369
The Single Subject Rule in Florida	382
<i>In re Advisory Opinion to the Attorney General</i>	382
The Single Subject Rule in California (and Elsewhere)	387
III. Procedural Requirements and Judicial Review	394
1. Strict Enforcement or Substantial Compliance?	397
2. Pre-Election Judicial Review	400
3. Hard Looks?	403

IV. Financing Qualification Drives	406
<i>Meyer v. Grant</i>	406
Chapter 9 · Major Political Parties	417
I. The Party and the Political System	418
Morris P. Fiorina, <i>The Decline of Collective Responsibility in American Politics</i>	421
The Continuing Decline of Party in the United States	424
Party Organizations	424
Party in the Electorate	426
Party in Government	426
Some Consequences of the Decline of Collective Responsibility	428
Immobilism	428
Single-Issue Politics	429
Popular Alienation from Government	430
II. Obligations of Parties under the Constitution	435
A. The Federal Interest in Regulating Party Primaries	436
B. The White Primary Cases and the State Action Doctrine	437
Daniel Hays Lowenstein, <i>Associational Rights of Major Political Parties: A Skeptical Inquiry</i>	440
C. The Constitution and the Party in the Legislature	444
<i>Ammond v. McGahn</i>	444
III. Associational Rights of Parties	448
A. Presidential Nominations	448
B. State Parties	458
1. Establishing the Right	458
<i>Tashjian v. Republican Party of Connecticut</i>	458
2. The Extent of the Right—Recent Cases	469
IV. Parties and Patronage	478
<i>Elrod v. Burns</i>	480
Chapter 10 · Third Parties and Independent Candidates	501
I. Ballot Access	504
<i>Munro v. Socialist Workers Party</i>	506
II. Minor Parties, Public Benefits, and Laws Favoring the Two-Party System	520
<i>Buckley v. Valeo</i>	520
<i>Timmons v. Twin Cities Area New Party</i>	529
<i>Arkansas Educational Television Commission v. Forbes</i>	538
Chapter 11 · Campaigns	549
I. What We Know about American Political Campaigns	550
II. Regulating Campaign Speech	555
<i>State of Washington v. 119 Vote No! Committee</i>	555
III. The Intersection of Communications Law and Election Law	568
<i>Radio-Television News Directors Association v. FCC</i>	568
Chapter 12 · Incumbency	579
I. The Incumbency Advantage	580
A. The Permanent Campaign	580

B. Incumbency and Electoral Competition	585
1. Extent of the Incumbency Advantage	586
2. Causes	590
3. Conclusion	597
II. Perquisites	598
<i>People v. Ohrenstein</i>	598
III. Competitiveness in Election Law Jurisprudence	618
<i>Miller v. Cunningham</i>	621
<i>New York State Board of Elections v. López Torres</i>	624
Chapter 13 • Bribery	631
I. Bribery of Candidates	632
<i>People v. Hochberg</i>	632
II. The Elements of Bribery	640
A. Corrupt Intent	641
B. Anything of Value	642
<i>People ex rel. Dickinson v. Van de Carr</i>	643
C. Intent to Influence	646
<i>State v. Agan</i>	648
<i>McCormick v. United States</i>	657
<i>United States v. Sun-Diamond Growers of California</i>	666
D. Official Act	671
<i>State v. Bowling</i>	671
Chapter 14 • The Buckley Framework	677
I. Introduction: Basic Facts and Figures about Campaign Financing in the U.S.	677
II. <i>Buckley v. Valeo</i> : The Foundation of American Campaign Finance Jurisprudence	679
<i>Buckley v. Valeo</i>	681
III. Empirical Observations about, and Theoretical Justifications for, Campaign Finance Regulation	713
A. Empirical Observations	713
B. Preventing Corruption	717
Daniel Hays Lowenstein, <i>On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted</i>	717
C. Promoting Equality	723
Edward B. Foley, <i>Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance</i>	723
Chapter 15 • Contribution Limits after Buckley	737
I. Campaign Contribution Limits in Ballot Measure Elections	737
II. When Are Contribution Limits Too Low?	744
<i>Nixon v. Shrink Missouri Government PAC</i>	745
<i>Randall v. Sorrell</i>	774
III. The End of Soft Money and the Regulation of PACs and Other Independent Expenditure Committees	790
A. BCRA and the End of Soft Money	790
B. PACs, 527s, and Independent Expenditure Committees	795
Richard Briffault, <i>The 527 Problem ... and the Buckley Problem</i>	798

Chapter 16 · Spending Limits after <i>Buckley</i>	807
I. Corporate Spending Limits in Ballot Measure Campaigns	807
<i>First National Bank of Boston v. Bellotti</i>	807
II. Limiting Spending by Corporations, Labor Unions, and Others in Candidate Elections	823
<i>Austin v. Michigan Chamber of Commerce</i>	831
III. Regulating Corporate and Union “Issue Advocacy:” The End of Spending Limits?	850
<i>Federal Election Commission v. Wisconsin Right to Life, Inc.</i>	853
 Chapter 17 · Public Financing	 875
I. Existing Public Financing Systems	877
A. In the States	877
Kenneth Mayer, Timothy Werner, and Amanda Williams,	
<i>Do Public Funding Programs Enhance Electoral Competition?</i>	877
B. In Presidential Elections	889
II. Public Financing: Voluntary or Coercive?	893
<i>Daggett v. Commission on Governmental Ethics and Election Practices</i>	895
III. Proposals for Reform	905
 Chapter 18 · Campaign Finance Disclosure	 913
<i>Buckley v. Valeo</i>	914
<i>McIntyre v. Ohio Elections Commission</i>	921
<i>McConnell v. Federal Election Commission</i>	940
 Appendix · Election Law Research Guide	 949
I. Introduction	949
II. Election Law Resources	950
A. General Resources	950
Books & Journals	950
Online Resources	951
B. Regulation of Campaign Finance and Campaign Speech	952
Books & Journals	952
Online Resources	952
C. Election Administration	953
Books & Journals	953
Online Resources	953
D. Voting Rights Act & Reapportionment	953
Books & Journals	953
Online Resources	954
E. Ballot Propositions	954
Books & Journals	954
F. Violations of Election Law & Political Corruption	954
Books & Journals	954
G. Political Parties	955
Books & Journals	955
Online Resources	955
H. Election Statistics	955
Books & Journals	955

Online Resources	956
I. Politics and Current Election News	956
III. Conducting Interdisciplinary Research	956
Table of Cases	959
Table of Authorities	971
Index	1003

Introduction to the Fourth Edition

We do not believe the federal prohibition on age discrimination in employment applies to casebook editors, but a few years ago our senior editor, Lowenstein, advised our then junior editor, Hasen, that there would be no need to research that question, because the Fourth Edition would be Lowenstein's last. It seemed prudent, then, to bring on a new editor, ready to serve as Lowenstein's replacement. Lowenstein and Hasen were extremely pleased when Daniel P. Tokaji of the Moritz College of Law at the Ohio State University agreed to take on the role. He joins us as co-editor of this Fourth Edition.

Lowenstein claims the privilege of adding a personal note in this and the following two paragraphs.^a I began making election law my principal academic specialty in 1980, at which time I believe I was the only law professor in America to do so. Roy Schotland of Georgetown doubled the field the following year, and our number grew slowly through the 1980s. Around the beginning of the 1990s it began to grow faster, and that trend has continued to the present day. If you believe in straight-line extrapolation, in twenty years about 98 percent of American law professors will be specializing in election law.

From early on, I knew that a good casebook would be beneficial for the field, but I hoped someone else would produce one. Finally, more than a decade after I began teaching the subject, and prompted and encouraged by a number of friends, especially Bruce Cain, I set myself to the task. Had I known of its onerousness from the start, I probably would never have begun. But Keith Sipe and the entire staff at Carolina Academic Press made the project as easy for me as they could, and since the book has been in print I have been gratified by the encouragement and constructive criticism I have received from students and colleagues who have used the book.

A couple of years after the book first appeared, I had the great good fortune of being able to recruit Rick Hasen to join me as co-editor, first of the annual supplements and then of the Second and Third Editions. Those who have been using the book from the start do not need to be told how much Hasen's participation improved the book. Now good fortune has struck again, with the addition of Dan Tokaji. A part of me is in this book, and I cannot imagine a better set of hands within which to leave it than those belonging to Hasen and Tokaji. I believe it is a strength of the book that the co-editors disagree among ourselves on substantive issues but see eye to eye on pedagogy and what a casebook should be. We want this book to train lawyers who may practice in election law, but even more we want to provoke thought about the growing interactions between the legal and elec-

a. Hasen reserves the right of rebuttal to appear in the Introduction to the Fifth Edition of the book. He has much to say about how much Lowenstein is responsible for the creation of this field (and some of it is even printable in a family publication!).

toral systems. We want the book to have a distinctive and sometimes even idiosyncratic voice, but not to be a vehicle for proselytizing. We want conservatives and liberals, reformers and traditionalists, and Republicans and Democrats all to be comfortable with this book. Then again, at times we want them all to be uncomfortable.

With respect to the Fourth Edition, we are proud to have achieved at least one goal. The volume you are holding is thinner than its predecessor, by about 77 pages. This despite the fact that since the Third Edition the Voting Rights Act has been renewed and the Supreme Court has decided a number of significant election law cases in a variety of fields, including campaign finance, redistricting, political parties, and election administration. Aside from the addition of this new material, we have made other changes, including a significant revamping of the campaign finance chapters, expanded coverage of the political science literature on campaigns in Chapter 11, expanded coverage of election administration in Chapter 7, and addition of a new section in Chapter 8 (on ballot propositions), discussing the vexing question of how strictly election law ground rules should be enforced against participants.

Those who are deeply learned in logic will have deduced that if the size of the book has been reduced and significant amounts of new material have been added, then some material must have been cut. We hope that the cuts make the book more streamlined and usable. But if you are an instructor who is regretting the loss of some of your favorite cases, take consolation in the fact that the same is true of some of ours.

Acknowledgments

Another addition is the Appendix on election law research, written by Sarah Sampson, of the Georgetown Law Library. We thank Ms. Sampson for her generous contribution and we hope our readers find it useful. In addition to the acknowledgements contained in the introductions to the first three editions, we wish to add our thanks to the following able research assistants: Alex Chen, Danielle De Smeth, Amanda Dittmar, Melissa Eakin, Natalie Heaton, John Khosravi, Ben Kington, Hal Melom, Jonathan Miles, Kristine Noyes, and Damion Robinson.

Introduction to the Third Edition

The first edition of this book was published in 1995 and the second edition in 2001. The Voting Rights Act is scheduled to come up for renewal in 2007, and we supposed that would be a good year if a third edition was warranted by sufficient interest in the book.

But as admirers of Scottish poetry are well aware, plans of mice and men, however well-laid, are apt to go agley, and the same applies to the plans of casebook authors. In 2002, Congress passed the Bipartisan Campaign Reform Act, the most important revision of federal election campaign law since 1974, and in December, 2003, the Supreme Court upheld most of the BCRA's provisions in *McConnell v. Federal Election Commission*. In addition, there have been important developments in redistricting law since our second edition, especially the Supreme Court's revisiting the question of partisan gerrymandering in *Vieth v. Jubelirer*. We reluctantly concluded that to attempt to deal with these developments in supplements would be too cumbersome.

This third edition is not a comprehensive revision. Indeed, if it were software we would probably call it Version 2.1. We have thoroughly revised the later chapters on campaign finance and made significant revisions to the redistricting chapters. Some other chapters, such as the one on ballot measures, have also been overhauled. But many chapters are virtually unchanged. We still intend to prepare a more thorough revision in 2007, and will welcome comments and suggestions by students, instructors, and others who use the book.

In the Introduction to the second edition, we mentioned two then-new resources in our field. One was the Election-Law Listserver, a forum for exchange of information and debate on developments in election law. If you'd like to subscribe, you may do so at <http://majordomo.lls.edu/cgi-bin/lwgate/ELECTION-LAW_GL>. The other was the inauguration of the quarterly *Election Law Journal*, published by Mary Ann Liebert, Inc., and edited by the two of us, assisted by attorney Sam Hirsch and an outstanding Editorial Advisory Board. As this is written, ELJ is completing its third volume. For information, visit <<http://www.liebertpub.com/elj/>>. Or flip through some copies in your local law library. If the *Election Law Journal* is not there, the librarian will no doubt appreciate being advised of this deficiency.

Election law has not been immune to the recent "blogging" phenomenon. One blog that is perhaps occasionally eccentric but always well-informed is owned and operated by Rick Hasen, who recused himself from participation in this paragraph. Hasen imaginatively entitled his blog "Election Law." Visit him at <<http://electionlawblog.org>>.

Other blogs of interest include Robert Bauer's blog on campaign finance issues <<http://moresoftmoneyhardlaw.com>>, Ed Still's "Votelaw" blog <<http://www.votelaw.com/blog>>, and Dan Tokaji's blog on voting technology issues <<http://equalvote>>.

blogspot.com>. These and other election law resources are linked on the right side of the “Election Law” blog.

Acknowledgments

To our cumulative list of acknowledgments we add the name of Richard Ellis, a political scientist who, having been good enough to write an essay on pluralism for our first chapter, which we carry over from the second edition, for this edition has—together with his publisher, the University Press of Kansas—kindly permitted us to reprint a chapter from his book on initiatives. In addition we thank the students who have assisted us on the supplements since the second edition or worked directly on the third edition: Landon Bailey, Peter Bartle, Justin Bowen, Grant Davis Denny, Nicole Drey, Amber Star Healy, Michael Kovalski, Tamara McCrossen, Matt Richardson, Eugene Rome, and Jesse Saivar.

Daniel Hays Lowenstein

Richard L. Hasen

Los Angeles

June 2004

Introduction to the Second Edition

The introduction to the first edition of this book (reprinted below) stated that “election law has not been a subject in the university.” Much has changed in the last six years. Election law is a course that now is taught in a large number of universities, is the subject of regular symposia in law reviews and, with the controversy over the 2000 presidential election, had its fifteen minutes as a subject of popular interest as well.

Those readers who have a strong interest in the field should note two developments. First, in January 1996, the election-law “listserver” was born. A listserver is an e-mail system by which any member of the group can post a message that is simultaneously delivered to all other members of the group. The election-law listserver is devoted to discussion of current developments in election law as well as related research and pedagogical issues. If you would like further information, point your web browser to majordomo.lls.edu/cgi-bin/lwgate/ELECTION-LAW_GL.

Second, the editors of this casebook have agreed to serve as editors of a new quarterly, peer-reviewed scholarly publication, the *Election Law Journal*. More information about the journal is available at www.liebertpub.com/elj.

Changes in the Second Edition

Although instructors who have used the first edition will find much here left intact, the book does make some significant changes. Some chapters were added simply to keep up with issues that have arisen in the last six years, such as the explosion of soft money and issue advocacy (see Chapter 18). Other chapters were added to expand coverage of the book, such as in the area of campaigns (Chapter 11) and campaign finance disclosure (Chapter 21). Of course, no book on election law in 2001 would be complete without a discussion of the 2000 presidential election controversy. Chapter 3 and Part III of Chapter 4 tackle issues related to the Florida recount. Finally, we have dropped some cases and added others as appropriate. Users of the second edition who wish to copy portions of deleted material from the first edition for classroom use have permission to do so.

Acknowledgments

We appreciate the helpful comments and suggestions from a number of our colleagues including Heather Gerken, Craig Holman, Antoinette Sedillo Lopez, Lance Olson, Nathaniel Persily, Melissa Saunders, Roy Schotland, David Schultz, Eugene Volokh, and Adam Winkler. The book would not have been possible without the generous support of our deans, David Burcham of Loyola Law School and Jonathan Varat of UCLA.

We gratefully acknowledge the research assistance of Michael Sweet, who helped with the 1996 supplement, Susan Bang and Mark Burnstein (1997), Beth Correia and Matthew Gorman (1998), Julie Caron Remer and Timothy Tozer (1999), and Greg Grossman (2000). We also thank Sofya Bendersky, Meghan Crowley, Caroline Djang, and Denise Waller for help on the second edition. The staffs of the Loyola and UCLA law libraries have been tremendously helpful to us as well.

We also thank Karen Mathews, Ann Palmer, Thelma Wong Terre and the faculty support staffs at Loyola and UCLA for exemplary administrative support, Tim Heindl for computer support, and the folks at Carolina Academic Press for putting it all together.

Hasen thanks his wife Lori Klein for judicious advice, patience, love, and support, especially when preparing the book seemed like caring for an additional child.

Since the first edition of this book was published, Lowenstein's sons, Aaron and Nathan, have (unexpectedly) grown up, and both are working in political jobs—Aaron for a city council member in New York City, Nathan as a redistricting analyst in California. Though they apparently have failed to learn from the error of their father's ways, their conscientiousness and sense of high purpose entitles them to be added to the list of family members mentioned in the previous introduction, from whom Lowenstein has received guidance.

Daniel Hays Lowenstein

Richard L. Hasen

Los Angeles

June 2001

Introduction to the First Edition

This book is based on the proposition that elections are important and that the structure and rules that govern them deserve the attention of citizens in general and of scholars and legal professionals in particular.

As the American university is constituted, election law falls at junctures formed by other subjects. This has not been an advantage, because junctures—these junctures, at least—have been peripheries. Most legal scholars who have considered election law issues have done so in pursuance of a different subject, most commonly constitutional law. In political science, election law falls at the juncture of two subdisciplines, American politics and public law. Most political scientists who specialize in American politics have no particular interest in law. Most political scientists who specialize in public law have no particular interest in electoral politics.

So election law has not been a subject in the university. But the confrontation of electoral politics and legal regulation has been pervasive and consequential in the past three or four decades. That election law has not been a subject is the university's loss and the university's failure.

Election law *has* been a growing subject in courtrooms, legislative chambers and political headquarters. One consequence has been increased work for lawyers. To prepare for such work is one good reason for law students to study election law. This book attempts to assist students in that preparation, but not in what might be termed a nuts-and-bolts fashion. There are some nuts and some bolts in this book (certainly the former!), but they are not presented exhaustively or systematically. Lawyers who need technical information about the Federal Election Campaign Act or the Voting Rights Act can find it easily enough. Indeed, details learned in law school are likely to have changed by the time the student is ready to apply them.

What distinguishes an outstanding legal professional from an ordinary one in the field of election law is the ability to understand the details of legal regulations as they affect and at least aspire to benefit the democratic political system. The sometimes mindless actions of election authorities (see *Barker v. Wisconsin Ethics Board* in Chapter 13 for one example^a) provide evidence that not all lawyers practicing election law have an adequate sense of their mission or the ability to carry it out. One goal of this book is to provide stimuli to law students that may help them develop this sense and this ability.

a. This case has been demoted to a note case on page 939 in the third edition.

The broader purposes of the book go beyond professional preparation. Study of and debate over democratic institutions are activities that enrich our lives as citizens and that enhance our ability to serve the society in which we live.

The book is interdisciplinary. Not because of a general belief in interdisciplinary studies, but because study of a subject at the juncture of other subjects must be interdisciplinary.

More concretely, the book assumes that lawyers and political scientists have much to learn from each other about election law. The lawyers, judges, and legal scholars who believe they have proved a point because they have shown that a given cause *could* have a given effect are neither imaginary nor extinct. Neither are the political scientists who conclude their rigorous empirical studies with casual and sometimes foolish assertions of their normative or policy implications.

Lawyers can benefit from exposure to the empiricism of political science. Political scientists can benefit from more focused attention on the legal questions to which their empirical studies may be relevant. Legal questions, after all, are normative questions of a particularly concrete and immediate nature.

Conventions Used in This Book

In the interest of saving the publisher's space and the reader's time, most of the materials reprinted in this book have been significantly edited. Insertions are indicated with brackets. Deletions are indicated with brackets or ellipses. However, footnotes have been deleted and citations have been deleted or altered without signalling. Sometimes, formatting of the original sources has been revised. For example, I do not follow the Supreme Court's practice of surrounding indented quotes with quotation marks. For purposes of serious research, the reader should consult the original sources.

Footnotes that are signalled with a number are from the original work and retain the numbers that they have in the original. Footnotes signalled with a letter are mine.

Opinions differ on the extent to which law school casebooks should contain references to the scholarly literature. The interdisciplinary nature of this book has persuaded me that heavy annotations are appropriate. Very few readers of this book—whether instructors, students, or general readers—will have a strong background on all the subjects presented. The references are intended to facilitate further reading on matters of interest and to provide a head start on research projects. They are not intended to be intimidating, and I hope they will not have that effect.

Although the references are extensive, they are not remotely exhaustive. In most cases they should be sufficient to get you into the literature that interests you.

Acknowledgments

This book was conceived more than a decade ago over breakfast with Andy Schepard at a long-since defunct restaurant in Westwood. Andy and I decided that there ought to be an election law textbook and that we should compile it. Shortly thereafter, circumstances enticed Andy into other enterprises, a misfortune for which there is some con-

solation in the thought that election law's loss has been family law's gain. This would have been a better book if Andy had been able to stay with it. Only a few of his words remain (primarily in Chapter 7^b), but I like to believe that some traces of Andy's energy, enthusiasm, and incisiveness have continued to animate the project.

Steve Ansolabehere, Bruce Cain, Morgan Kousser, and Ray Wolfinger read portions of the manuscript of this book and gave me helpful suggestions.

Aside from judicial decisions, this book draws primarily on academic materials. Nevertheless, I hope there are some politics in the book. If so, and if the politics make any sense, it is only because my activities in and around politics have allowed me to be associated with people of extraordinary talent and understanding. This group has included Howard Berman, Michael Berman, Jerry Brown, Carl D'Agostino, Doug Faigin, Jean-Marc Hamel, Pierre-Marc Johnson, André Larocque, Tom Quinn, Tony Quinn, Keiko Shimabukuro, Jonathan Steinberg, Bob Stern, and Henry Waxman.

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Although I have not attempted to conceal my own views on the subjects treated in this book, I have tried to assure that the book is not a brief for those or any other views. But I hope the book is animated by a respect for truth and a regard for the public good. My

b. This chapter is now Chapter 9 in the fourth edition.—Eds.

parents taught me this aspiration, and their teaching has been reinforced by the example set by my wife, my sister and a gaggle of cousins, aunts, uncles, and in-laws.

Everyone I have mentioned has left a mark on this book.

Daniel Hays Lowenstein

Los Angeles

May, 1995

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